

Editor's note: Reconsideration denied by Order dated March 29, 1988

MARY MAGERA

IBLA 87-395

Decided February 8, 1988

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, cancelling private maintenance and care agreement for wild free-roaming horses. NM 4700.

Affirmed.

1. Evidence: Sufficiency -- Wild Free-Roaming Horses and Burros Act -- Evidence: Burden of Proof

BLM may properly cancel a private maintenance and care agreement for wild or free-roaming horses upon receiving proof that the animals which are the subject of the agreement are in a deteriorated condition. Under such a circumstance, the burden of proving that the deteriorated condition was not caused by the adopter's own conduct, so as to permit the agreement to remain in effect, rests with the adopter.

APPEARANCES: DeAnn Stocker, Paris, Texas, for appellant; Gayle E. Manges, Esq., Office of the Solicitor, Southwest Region, Santa Fe, New Mexico, for Bureau of the Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Mary Magera, appearing through her mother DeAnn Stocker, has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated January 15, 1987, cancelling her private maintenance and care agreement for two wild free-roaming horses. In the decision of January 15, 1987, BLM explained that "[t]he horses were in very poor condition" and that as a result, BLM had taken possession of the horses on December 29, 1986, and reassigned them to a new adopter. The maintenance agreement entered into between BLM and appellant on April 26, 1986, was ordered cancelled for the reason that appellant had failed to provide "proper care and protection for the animals under humane conditions." 1/

1/ We note at the outset that BLM's decision states: "This decision is placed in full force and effect this date." 43 CFR 4.21(a) provides that "except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely

In her statement of reasons filed in support of her appeal, appellant admits the horses were in poor condition, as claimed by BLM, but argues the "horses weren't starving" as several witnesses were reported to have stated in complaints to BLM which led to the repossession and transfer of the horses. Instead, appellant argues, the condition of the entire herd of horses of which the two animals in question were a part, was the result of unknown causes. In a separate brief, appellant offers the opinion that "parasites" were the cause of the animals' condition when observed by BLM's employees.

On June 11, 1987, appellant and BLM were requested to furnish additional information concerning the two horses which are the subject of this appeal. On July 14, 1987, BLM responded to the Board's order concerning these two animals as follows:

Wild horses with freeze mark #82815583 and #86815529 were repossessed by BLM because of their condition. These were the two remaining wild horses which had been assigned to Mary Magera and are the subject of this appeal. In the Notice of Appeal (p. 20 of 26), reference is made to #86815529 as being wormy in appearance and "looked awful." Thus, the appeal substantiates BLM contention that the animal was in poor condition and not receiving proper care. No mention is made of #82815583 in the Notice of Appeal and Statement of Reasons. Therefore, the reason as set forth in the decision of January 15, 1987, is admitted and no further response is needed.

On July 2, 1987, appellant filed her response to the Board's order seeking further information, in which she reasserts her claim to the return of the two horses taken from her and the reinstatement of her maintenance agreement. With her response, appellant has furnished a copy of a letter signed by a person calling himself a "consultant veterinarian" whose signature appears to be "Robert J. Arko." This letter discusses the meaning of horse blood specimens apparently examined by this letter's author. Also attached are reports by Chief Deputy David Ewalt, county sheriff's office, dated March 2 and February 18, 1987, concerning his observations of a band of horses in a pasture on February 18 and 19, 1987. Ewalt opined that the horses observed both days were in normal condition. Additionally, appellant has furnished a document entitled "request for investigation," which

fn. 1 (continued)

affected may file a notice of appeal." An adversely affected person may file a notice of appeal within 30 days of service of a decision or its publication in the Federal Register. 43 CFR 4.411(a). Because there is no applicable "law or other pertinent regulation" that would except BLM's decision from the operation of 43 CFR 4.21(a), that statement in that decision that it is in full force and effect as of the date it was issued is incorrect. Further, the timely filing of the notice of appeal of BLM's decision suspended that decision pending our decision on appeal. 43 CFR 4.21(a). Our action today affirming BLM's decision lifts that suspension and effectively cancels the agreement as of the date of the BLM decision, Jan. 15, 1987.

postulates the possibility the horses adopted by her may have been poisoned, and asks this Board to investigate the cause of the conditions observed which led to the repossession of the two horses in December 1986 and the cancellation of appellant's wild horse agreement. Appellant states that "I realize that I may be requesting something out of your jurisdiction, but I do not know who else to contact."

In a further response to appellant's suggestion that the horses had been poisoned, BLM has stated that:

Ms. Stocker's request to investigate the deliberate poisoning of the horses could not be determined by this office at this late date. Her letter seems to center around the charges filed in the local courts. BLM has not filed criminal charges, rather, charges of such were left to local authorities. BLM took possession of the untitled wild horses for their protection and welfare. Our position is stated in the Response to Order, June 11, 1987.

Ms. Stocker's request refers to a letter from Lt. Comdr. Arko of the Center for Disease Control (CDC) in Atlanta. This letter was not enclosed with correspondence received from the Board. Her request on page 3 of 7 pages indicates that Dr. Gregg "reluctantly agreed that some form of poisoning was involved after seeing the CDC letter."

L. P. Gregg, DVM, Gregg Animal Clinic, was contacted by telephone by Robert L. Schultz, Special Assistant, Office of the State Director, BLM, on July 14, 1987. Dr. Gregg stated that he had seen the CDC letter and that poison is possible, but remote. Dr. Gregg maintained that the horses had a negative energy flow (malnutrition).

While poison cannot be ruled out, it nevertheless was necessary to repossess the wild horses for their own welfare.

(Memorandum from New Mexico State Director, BLM, to the Field Solicitor, Santa Fe, dated July 21, 1987).

The authority of this Department to inquire into these matters arises from the provisions of the Act of December 15, 1971, as amended, 16 U.S.C. § 1333(c) (1982), which provides that the Secretary of the Interior has authority to assign wild free-roaming horses to an individual for private maintenance for a period of one year and then to transfer title to the horse where it is determined that humane conditions have been provided pursuant to the terms of the agreement for maintenance. If, however, it appears the horse has been treated "inhumanely" or the terms of the agreement have not been observed, the Secretary may cancel the agreement and take possession of the animal, pursuant to 43 CFR 4770.2(b). This appeal presents the question, therefore, whether in December 1986, these animals were being inhumanely treated or were not being cared for as required by the maintenance agreement. Department regulation 43 CFR 4700.0-5(f) defines

"inhumane treatment" as "any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse or burro and is not compatible with animal husbandry practices accepted in the veterinary community."

[1] Previous decisions by this Board have taken the position that it is not incumbent upon BLM to demonstrate the cause of an observed condition of a wild free-roaming horse which is in the temporary custody of a prospective adopter. In these cases we stated that the Secretary may rely upon an observed "deteriorating condition of the animals themselves and * * * the credible reports of third parties" in deciding to repossess the animals and cancel a maintenance agreement during the first year. Dennis Turnipseed, 66 IBLA 63, 67 (1982). Such an approach does not imply a finding that an adopter has been deliberately cruel. Kathryn E. Spring, 82 IBLA 26, 30 (1984). It simply means that the condition of the horses was found to reasonably justify their repossession and the cancellation of the adoption agreement pursuant to Departmental regulation 43 CFR 4700.0-5. That is the case here: appellant does not deny the deteriorated condition of the horses, but seeks to excuse her own responsibility for the condition. Whatever may have been the cause, the condition of the horses deteriorated while in her care. This circumstance required the action taken by BLM in this case. Indeed, appellant recognizes this Board may lack the authority and the means to discover the actual cause of the animals' decline. In order to prevail in this appeal, she must establish that the cause of the animals' decline was not attributable to any conduct on her part, or any failure by her to take necessary care of the horses. She has, however, offered no proof of any kind concerning the cause of the observed condition of these animals. She has, therefore, failed to show that BLM's cancellation of her agreement was erroneous, and must consequently be denied relief.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge